2001

Robert E. Wilcox v. CSX Corporation : Reply Brief

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Douglas M. Monson, Brent D. Wride, Elaine A. Monson; Ray, Quinney & Nebeker; attorneys for appellant.
E. Scott Savage, Samuel O. Gaufin; Berman, Gaufin, Tomsic, Savage & Campbell; attorneys for appellee.

IN THE UTAH SUPREME COURT

ROBERT E. WILCOX, Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company, Plaintiff and Appellant, v. CSX Corporation, Defendant and Appellee.	Case No. 20010411 Priority No. 15

Reply Brief of Appellant

Appeal from Judgment Entered by
The Third Judicial District Court, Salt Lake County,
The Honorable Glenn Iwasaki

E. Scott Savage
Samuel O. Gaufin
BERMAN, GAUFIN, TOMSIC,
SAVAGE & CAMPBELL
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144

Attorneys for Defendant/Appellee

Douglas M. Monson
Brent D. Wride
Elaine A. Monson
RAY, QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Attorneys for Plaintiff/Appellant

IN THE UTAH SUPREME COURT

ROBERT E. WILCOX, Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company, Plaintiff and Appellant, v. CSX Corporation, Defendant and Appellee.	Case No. 20010411 Priority No. 15

Reply Brief of Appellant

Appeal from Judgment Entered by
The Third Judicial District Court, Salt Lake County,
The Honorable Glenn Iwasaki

E. Scott Savage
Samuel O. Gaufin
BERMAN, GAUFIN, TOMSIC,
SAVAGE & CAMPBELL
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144

Attorneys for Defendant/Appellee

Douglas M. Monson
Brent D. Wride
Elaine A. Monson
RAY, QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

The Utah Insurance Commissioner, acting as the liquidator ("Liquidator") of Southern American Insurance Company ("SAIC"), respectfully submits this reply brief in support of his appeal from the summary judgment entered in favor of CSX.

ARGUMENT

In his opening brief, the Liquidator established that the trial court erred in holding that, as a matter of law, CSX had provided SAIC with new and contemporaneous consideration in exchange for the three payments that SAIC made to CSX. As explained by the Liquidator, the policy of the new-and-contemporaneous-consideration defense is to allow companies to acquire goods and services even though they are close to liquidation. Because CSX did not provide SAIC with anything <u>new</u> that augmented the estate, and because SAIC did not make the payments to CSX <u>contemporaneously</u> with the acquisition of the debt, the trial court erred in granting summary judgment in favor of CSX.

I. CSX DID NOT PROVIDE NEW CONSIDERATION TO SAIC FOR THE $308,000 IN PAYMENTS IT RECEIVED.

The Liquidator's opening brief establishes that the district court erred first by holding that, as a matter of law, the consideration provided by CSX was new. CSX responds to the Liquidator's arguments by arguing that any consideration is, by definition, new. CSX also argues that it is improper to look to federal bankruptcy decisions for guidance in this matter. Next CSX suggests that even if all consideration is not inherently new, the settlement agreement in this case provided SAIC with something new. As shown below, these arguments are incorrect.

A. MERE LEGAL CONSIDERATION IS INSUFFICIENT TO ESTABLISH A DEFENSE UNDER THE VOIDABLE PREFERENCE STATUTE.

CSX contends that the new and contemporaneous consideration defense set forth in Utah Code Annotated § 31A-27-321(4)(a) precludes the Liquidator from recovering the $308,000 in payments made to CSX. See Opposition Brief at 13-19. CSX supports its contention by focusing on the purported legal meaning of the word "consideration" and claiming that the October 14, 1991 Settlement Letter which included a release of "future" claims provided the necessary new and contemporaneous consideration.

CSX's arguments miss the point. The question in this case is not whether the settlement agreement between CSX and the Liquidator was supported by adequate consideration. Rather, the question before the Court is whether any consideration provided was "new" and "contemporaneous."

CSX argues repeatedly that "if there was consideration, it was by definition 'new.'" Opposition Brief at 20-21. See also, e.g., id. at 20 ("there is simply no consideration without it being new"); id. at 21 ("by definition the consideration was new"). However, after arguing at length in its opposing brief that a court should give meaning and effect to every word in a statute, CSX fails to give any significance to the words "new" and "contemporaneous," which are included in Utah's statute. Instead, CSX focuses all of its attention on the meaning of the word "consideration." However, more is required under Utah's statute than that mere "consideration" was given. CSX had the burden to establish that any consideration given was also "new" and "contemporaneous" to qualify for this defense. The question is whether CSX enhanced the estate by providing something new. However, if CSX's argument is accepted, then the word "new" would be written out of the statute, and the new and contemporaneous consideration exception would swallow up the preference statute. Creditors who wanted to get a large payment on the eve of a liquidation would simply rush to enter into a settlement agreement with the insolvent entity and then claim that something of value (i.e. "consideration") was exchanged for the payment the creditor received. The Court should reject CSX's attempt to rewrite the statute by deleting the word "new."

B. UTAH'S LIQUIDATION STATUTE WAS BASED UPON BANKRUPTCY LAW, AND IT IS APPROPRIATE TO LOOK TO FEDERAL BANKRUPTCY COURT DECISIONS FOR GUIDANCE.

CSX attempts to avoid the numerous and persuasive cases cited by the Liquidator by arguing that they do not apply because they analyze different language in the federal bankruptcy code. First, the Utah liquidation statute was modeled after federal bankruptcy law, and it is perfectly appropriate to look to bankruptcy decisions for guidance.[1] Because voidable preference statutes under state insurance liquidation law are very similar to the voidable preference statute under the federal bankruptcy code, other courts that have had to determine whether a transfer is preferential under state insurance law have stated that "it is customary to look to federal bankruptcy law for guidance." See e.g. Pine Top Ins. v. Bank of America Nat. Trust & Sav., 969 F.2d 321, 324 (7th Cir. 1992). Indeed, CSX itself relies on bankruptcy decisions when it believes those decisions

[1] The Liquidator is not aware of any cases that specifically construe the meaning of the phrase "new and contemporaneous consideration" in Utah's statute.

support its position. See, e.g., Opposing Brief at 23 (citing In re Stephens 242 B.R. 508 (D. Kan. 1999)).

More importantly, while the bankruptcy code uses the word "value" and the Utah statute uses the word "consideration," this is not the language that matters. The question in this case is whether the consideration was "new" and "contemporaneous," and in this regard both statutes use precisely the same words: "new" and "contemporaneous."

The bankruptcy cases relied upon by the Liquidator are cited for the purpose of establishing that the "new" and "contemporaneous" components of the defense cannot be met. In other words, CSX's attempt to distinguish the word "consideration" from the word "value," as used in the bankruptcy code, does not defeat the Liquidator's argument that the new and contemporaneous consideration defense has no application in this case. Indeed, in the Pan Trading case cited in the Liquidator's opening brief, the court references both the terms "new consideration" and "new value" in concluding that settlement payments were not new and contemporaneous. See In re Pan Trading Corporation, 125 B.R. 869 (S.D.N.Y. 1991). The court stated:

> The payments in the instant case bear none of the earmarks of a contemporaneous exchange. The parties to the litigation settled upon a penalty to cure violations and then they set forth a schedule for payment. There was **no new consideration, no contemporaneous exchange for new value**, only payment upon an antecedent debt to satisfy a fine on long standing violations. Id. at 876-77 (emphasis added).

In sum, as shown below, numerous federal courts have decided the precise question now before the Court and have analyzed the identical words at issue in this appeal. Those well-reasoned and persuasive decisions demonstrate that the new-and-contemporaneous-consideration defense does not apply in this case because the payments by SAIC to CSX were neither for "new" nor "contemporaneous" consideration, but rather were made for an antecedent debt that SAIC owed to CSX.

C. CSX'S ARGUMENT THAT "NEW" CONSIDERATION WAS PROVIDED TO SAIC IN EXCHANGE FOR THE $308,000 FAILS AS A MATTER OF LAW.

CSX argues that it gave "new" consideration to SAIC because CSX gave up the right to prosecute its existing claims against SAIC, obtain a judgment against SAIC, and execute on that judgment, and because CSX gave SAIC a release from all further claims that could be asserted against it. See Opposition Brief at 20. As explained below, this argument fails as a matter of law.

1. CSX's Forbearance from Asserting Legal Rights Against SAIC Such as Giving Up the Right to Obtain a Judgment and Execute on that Judgment Did Not Constitute New Consideration.

The law is well settled by courts adjudicating preference cases that forbearing from asserting pre-existing legal rights does not constitute new value, or in this case, new consideration. See, for example, In re Aero-Fastener, Inc., 177 B.R. 120, 138 (Bankr. D. Mass. 1994) and the numerous cases cited therein. The reason is that forbearing from asserting an already existing legal right usually does not provide any tangible value to an estate. As stated by one court:

> "When a creditor threatens to exercise a legal remedy against a debtor, and in exchange for not so doing extracts a payment for antecedent debt, nothing of value has accrued to the debtor estate to compensate other creditors for the loss of that payment. . . . Such a transaction falls squarely within the ambit of the preference law, rather than within its exceptions." (Citation omitted).

In re Bangert, 226 B.R. 892, 903 (Bankr. D. Mont. 1998).

Likewise, in Aero-Fastener, the court held that a creditor's forbearance from going forward on its bulk attachment motion failed to qualify as a new and contemporaneous exchange of value. In re Aero-Fasterner, 177 B.R. at 139. Similarly, in In re Air Conditioning, Inc. of Stuart, 845 F.2d 293, 298 (11th Cir. 1988), cert. denied, 488 U.S. 993 (1988), the court held that an agreement by an undersecured creditor to forego its right to foreclose on collateral could not be treated as new value within the meaning of a preference statute.

Likewise, in In re Bioplasty, Inc., 155 B.R. 495, 498 (Bankr. D. Minn. 1993), the court found that the creditors' dismissal of class action securities claims and a release of an injunction in exchange for payments made pursuant to a settlement agreement did not constitute new value, even where the debtor has considered the expenses of litigation in deciding to settle the matter. The court stated:

> Although the settlement agreement states that the debtor considered the expenses of litigation in settling, and that the debtor specifically denies any wrongdoing, I find that the most significant factor in settling the class action suit was the risk that the debtor would be found liable. As paragraph V of the settlement agreement states, the debtor clearly considered 'the uncertainty and the risk of the outcome in any litigation, especially a complex case such as this.' Certainly the debtor's driving concern in settling the class action suit, as in any large commercial dispute, was the risk of liability. The settlement payments were made in light of such risk, and therefore were on account of the antecedent debt.

Id. at 499.

In this case, CSX's decided to forego prosecuting its claims against SAIC and obtaining and executing on a judgment. However, in so doing CSX was merely forbearing from asserting pre-existing legal rights. The law is clear that such a forbearance does not constitute new consideration.

2. CSX's Release of Claims In Favor of SAIC Did Not Constitute New Consideration.

CSX attempts to avoid the cases and principles cited above by contending that new consideration was provided because SAIC was given a release which precluded past, present, or future asbestos-related claims being asserted against it, and which saved the parties litigation expenses.[2] Opposition Brief at 20-21. Similar arguments have repeatedly been rejected by the courts and for good reason. As explained in In re Energy CO-OP, Inc., 832 F.2d 997 (7th Cir. 1987), a release in a preference action likely is worthless to other creditors because the release does not free up any assets for other creditors because the debtor could not have paid the preferred claim in any event. Id. at 1004. All the payment for the settlement and release does is to deplete the estate at the other creditors' expense, which frustrates the intent behind the preference statute which is to promote an equitable distribution among all creditors and not to favor any one particular creditor. Id. See also In re Bownic Insulation Contractors, Inc., 134 B.R. 261, 265-66 (Bankr. S.D. Ohio 1991) (the release of an unsecured claim, which included a claim in subrogation, did not fall within the new value exception because the release provided no benefit to the estate).

Likewise, in the case at bar, CSX's release of unsecured claims in favor of SAIC did not provide any tangible benefit to SAIC's estate. Rather, SAIC's payment of $308,000 to CSX diminished the liquidation estate thereby harming other creditors of

[2] Only asbestos-related claims were covered by the settlement agreement. CSX did not release claims for environmental and other losses, and CSX has submitted claims in the SAIC liquidation for such losses.

SAIC's estate. The new and contemporaneous consideration defense simply is not intended to apply in such circumstances.

CSX also argues that because the release contained in the October 14, 1991 Settlement Letter included "future" claims, as opposed to just past or present claims, this satisfies the "new consideration" requirement of the defense. See Opposition Brief at 22. In so arguing, CSX maintains that future claims cannot already be in existence because they are yet unknown and because SAIC's liability on those claims has yet to be established. Id.

However, in making this argument CSX fails to take into account that Utah's Insurance Code definitively establishes that claims which are unknown, contingent or unmatured are still nevertheless existing claims. The Utah Insurance Code defines "creditor" and "claim" as follows:

> (21) "Creditor" means a person, including an insured, having any claim, whether matured, unmatured, liquidated, unliquidated, secured, unsecured, absolute, fixed, or contingent.
>
> (14.5) "Claim," unless the context otherwise requires, means a request or demand on an insurer for payment of benefits according to the terms of an insurance policy.

Utah Code Annotated § 31A-1-301(14.5) and (21) (1991).[3] Applying these definitions, CSX was a creditor who had claims against SAIC pursuant to the terms of three excess insurance policies that SAIC issued in favor of CSX or its predecessors with coverage periods between July 14, 1979, and July 31, 1982. Moreover, CSX instituted a claim

[3] Those same definitions are currently found in Utah Code Annotated, § 31A-1-301(19) and (28).

against SAIC by filing three lawsuits in which CSX made a demand on SAIC to pay any and all sums that were due and owing under these policies. The lawsuits, which were filed by CSX or its predecessors against SAIC in October of 1985 and January of 1990, demanded payment for all sums, including future claims.

A similar argument to that asserted by CSX was considered and rejected by the court in In re Bioplasty, 155 B.R. 495 (Bankr. D. Minn. 1993). In that case, the defendant argued that while a claim itself can be disputed, contingent, or unliquidated, there can only be a debt on that claim where liability has been established. The court was not persuaded by that argument and stated as follows:

> The Bankruptcy Code defines a debt as a "liability on a claim," and defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (Citation omitted). The actions that gave rise to the class action suit gave the class action plaintiff's a right to pursue damages against Bioplasty. Even though any ultimate right to payment was disputed, contingent, unliquidated, and not reduced to judgment, such right still constitutes a claim under the Bankruptcy code, and "[w]here a claim exists, so does a debt." (Citation omitted).

Id. at 498. Based on the foregoing, the court in Bioplasty found that the transfer in that case, which arose because of the alleged actions that gave rise to the lawsuit, was made on account of an antecedent debt. Therefore, the court rejected the application of the new value defense. Likewise, in this case, it makes no difference that the release provided by CSX to SAIC covered past, present, and/or future claims. SAIC made the $308,000 in payments to CSX to cover antecedent debts, and therefore, the new and contemporaneous consideration exception to the Liquidator's preference action is not applicable.

Based on the foregoing, CSX's argument that any consideration provided as a result of the settlement was "new," must be rejected.

II. CSX'S ARGUMENT THAT "CONTEMPORANEOUS" CONSIDERATION WAS PROVIDED TO SAIC IN EXCHANGE FOR THE $308,000 ALSO FAILS AS A MATTER OF LAW.

As shown above, CSX did not provide "new" consideration for the substantial payments it received from SAIC. The summary judgment of the trial court must therefore be reversed on that basis alone. In addition, even if any consideration provided had been "new," it was not "contemporaneous." This provides a further, independent basis for reversal.

A. THE PAYMENTS MADE BY SAIC COULD NOT HAVE BEEN CONTEMPORANEOUS BECAUSE THEY WERE MADE WELL AFTER THE CLAIMS AROSE UNDER THE INSURANCE POLICIES AND AFTER LAWSUITS WERE FILED AGAINST SAIC IN CONNECTION WITH THOSE POLICIES.

CSX attempts to avoid the "contemporaneous" requirement of the defense by arguing that its claims did not arise under the insurance policies, but rather they arose much later when CSX and SAIC settled the lawsuits and when each payment became due under the October 14, 1991 Settlement Letter. See Opposition Brief at pp. 23-24. However, this contention is not correct as illustrated by In re Southmark Corp., 88 F.3d 311 (5th Cir. 1996), cert. denied, 519 U.S. 1057 (1997). In the Southmark case, a corporation transferred funds into an escrow for disgruntled minority shareholders to reimburse them for their expenses incurred in a proxy lawsuit. When the corporation later filed bankruptcy and the shareholders were sued on a preference claim for the return of the escrow funds, the shareholders argued that the corporation did not have a "debt" to repay their reimbursement claim until the corporation agreed to pay the reimbursement, and therefore the transfer was not for an "antecedent debt." The Fifth Circuit disagreed, noting that the shareholder "claim," and the corporation's corresponding reimbursement "debt," even if disputed and contingent, still arose at the time that the shareholders demanded reimbursement, not later when the corporation settled the dispute by agreeing to pay the reimbursements. "This conclusion is not only consistent with the statute and the case law, but also comports with the general observation that a settlement agreement resolves preexisting claims." Id. at 318.

Similarly, the case of Buggage v. Yellow-Checker Cab Company, 623 So.2d 906 (La. App. 1993), illustrates that the settlement of an insurance obligation is inextricably tied back to the claim itself. The court explained:

> LIGA's argument attempts to characterize a settlement as an obligation separate from the claim itself. However, a settlement is merely the method in which a claim is negotiated and satisfied by the parties prior to trial. The fact that a claim is agreed to immediately by the insurer, or negotiated over a period of time, does not negate the fact that the claim arose out of the insurance policy and is therefore a "covered claim" . . .

Id. at 907.

At the very latest, CSX's claim and SAIC's corresponding debt, even if it was disputed, contingent, or unmatured, arose when CSX's predecessors filed the three lawsuits against SAIC to recover damages under the insurance policies. For instance, in In re Winkle, 128 B.R. 529 (Bankr. S.D. Ohio 1991), the court held that a contingent claim need not have been reduced to judgment in order for a claim and its corresponding debt to exist. In that case, the defendant had filed a lawsuit in which he made various allegations against the debtor and sought damages from him. As a result of that lawsuit, vehicles and other property were transferred to the defendant. The debtor later filed for bankruptcy and the trustee brought a preference action against the defendant to recover certain transfers of the property. The defendant countered by arguing that no antecedent debt on the part of the debtor could exist because no judgment had ever been obtained against the debtor. The court rejected this argument and stated as follows:

> These allegations and requests for relief [set forth in the complaint] go beyond those necessary for the imposition of a constructive trust for the benefit of Palmer; they assert a right to payment against Kenneth Winkle and as such constitute a "claim" against him. The fact that such antecedent debt was not reduced to judgment prior to the transfer of the 1934 automobile is, of course, irrelevant. It is sufficient that the claim was contingent or disputed. (Citation omitted).

Id. at 536.

In this case, the language of the insurance policies issued by SAIC provided coverage to CSX for three separate periods beginning on July 14, 1979, and ending on July 31, 1982. Following the expiration of these coverage periods, all of the events necessary to give rise to a claim or cause of action under those policies had occurred. Indeed, CSX alleged as much in the three separate lawsuits it filed against SAIC seeking judgments based on the insurance policies. The October 14, 1991 Settlement Letter did not create the basis for SAIC's liability to CSX. Rather, the events that occurred while these insurance policies were in effect created the basis for SAIC's liability. The October 14, 1991 Settlement Letter only memorialized the agreement between SAIC and CSX as to the terms of payment of that pre-existing debt. Thus, the payments that were made by SAIC were not made contemporaneously with the debts. They were made well after the debts arose, and the new-and-contemporaneous defense does not apply as a matter of law.

B. EVEN IF CSX'S ARGUMENT IS ACCEPTED THAT THE SETTLEMENT OF THE LAWSUIT CREATED A NEW OBLIGATION, THE PAYMENTS MADE BY SAIC TO CSX STILL WERE NOT CONTEMPORANEOUS.

CSX contends that the payments made to it could not have been for or on account of an antecedent debt because the settlement created a new debt between SAIC and CSX. See Opposition Brief at 24. Even if this were true, the payments were not made at the time the settlement was agreed to and were therefore not "contemporaneous" with that agreement. Thus, CSX's claims fail as a matter of law.

First, the correspondence between counsel for CSX and SAIC indicates that the parties reached their settlement agreement on August 26, 1991. On that date, after several weeks of negotiation, counsel for SAIC received a letter from counsel for CSX accepting SAIC's prior offer to pay CSX $308,000 in three equal installments. (R. 468, 469). The August 26, 1991 letter, from CSX's counsel, reads in pertinent part as follows:

> CSXT has asked me to convey to you that it is willing to accept Southern American's offer of $308,000 to settle CSXT's asbestos coverage litigation. CSXT understands that Southern American will make the payment in three installations due on October 31, November 30, and December 31, 1991, respectively. (I would suggest the first two payments be in the amount of $102,667 each and the last in the amount of $102,666).
>
> Please provide me, for CSXT's review, with Southern American's proposed settlement documents as soon as possible.

(R. 469). Under Utah law the operative date for enforcement of a settlement is the date the settlement terms were agreed to, not the later "memorialization" date. See Murray v. State, 737 P.2d 1000, 1001 (Utah 1987). Indeed, had SAIC attempted to back out of the settlement subsequent to August 26, 1991, Defendant would have had the right to sue to enforce the August 26, 1991 agreement. Id. Accordingly, the October 14, 1991

Settlement Letter did not create the settlement agreement, it simply memorialized a prior agreement that had already been reached by the parties. Since the payments made from SAIC to CSX did not clear SAIC's checking account until November, December, and January of 1991, they were not contemporaneously made with the settlement agreement that was reached in August of 1991.

However, even if the Court accepts CSX's assertion that the October 14, 1991 Settlement Letter created a new obligation between SAIC and CSX, the three payment totaling $308,000 from SAIC to CSX still were not made contemporaneously with that agreement. CSX argues that the contemporaneous component of the defense is met because each debt of SAIC was incurred when each payment became due. See Opposition Brief at 24. However, the courts have rejected this approach and instead have held that in the case of an installment contract, a debtor becomes legally obligated on the date when the debtor originally undertakes the obligation, not when each payment becomes due. See In re Futoran, 76 F.3d 265, 267 (9th Cir. 1996); In re Intercontinental Publications, Inc., 131 B.R. 544, 549 (Bankr. D. Conn. 1991).

Based on the foregoing, even if the October 14, 1991 Settlement Letter created a new agreement between the parties, that agreement contained its own terms and consequences and carried with it a presumption of continued validity absent an explicit abrogation by the parties. Accordingly, CSX cannot now argue that at every point in time when a payment became due the parties created a new contract with identical terms to the one that was replaced moments earlier. In this case, SAIC still did not make contemporaneous payments under the October 14, 1991 Settlement Letter because the payments cleared[4] SAIC's checking account 30, 53, and 94 days after October 14, 1991. See e.g. In re Carolyn's Kitchen, Inc., 209 B.R. 204, 207 (Bankr. N.D. Tex. 1997) (payments made three months and longer after settlement agreement were not contemporaneous); In re Independence Land Title Corp., 9 B.R. 394, 396 (Bankr. N.D. Ill. 1981) (perfection of security interest 2 months later held not to be contemporaneous).

C. THE BANKRUPTCY CASES CITED BY CSX TO SUPPORT ITS NEW AND CONTEMPORANEOUS DEFENSE HAVE BEEN CRITICIZED SOUNDLY ARE FACTUALLY DISTINGUISHABLE AND REPRESENT THE MINORITY VIEW.

CSX also argues that even if the Court considers bankruptcy law and the "new value" defense set forth in the bankruptcy code, it would still be entitled to prevail in this appeal. In support of this argument, CSX cites cases such as Lewis v. Diethorn, 893 F.2d 648 (3rd Cir. 1990)[5]; and Nelson Co. v. Amquip Corp., 128 B.R. 930, 935 n. 13 (E.D. Pa. 1991). See Opposition Brief at 15 n.11. However, these bankruptcy cases have been soundly criticized. For instance, in In re Bioplasty, Inc., 155 B.R. 495, 499 (Bankr. D. Minn. 1993), the court stated:

> *Second*, the defendants argue that the transfer was made, not on account of such antecedent debt, but rather to eliminate the costs and risks associated with litigation. **The defendants rely on *Lewis v. Diethorn,*** 893 F.2d 648, 650 (3d Cir. 1990). Although *Diethorn* did hold that the settlement payments in the case before it were made in consideration for the termination of the lawsuit and release of a *lis pendens*, **I am not persuaded by the Third Circuit's holding. The opinion**

[4] The Liquidator submits that the clearance date of a check would be better representative of the date a check was actually received than the date which appears on the check.

[5] Lewis is also factually distinguishable from the case at bar because the payment in that case lifted an equitable lien from the property of the estate. Accordingly, the court based its finding on the fact that the property rose in value due to the removal of the equitable lien and therefore provided new value to the estate. However, in the case at bar, CSX had no liens on any of SAIC's property and SAIC received nothing of tangible value from CSX as a result of the settlement of the lawsuits.

> **contains no analysis whatsoever, and simply makes the conclusory statement that the payments were made for one reason rather than another.**
>
> Even if I could be convinced that *Diethorn* reached the proper conclusion on the facts before it, I would distinguish it from the case before me today. . . . **Certainly the debtor's driving concern in settling the class action suit, as in any large commercial dispute, was the risk of liability. The settlement payments were made in light of such risk, and therefore were on account of the antecedent debt.**

(Emphasis added).

Similarly, in In re RDM Sports Group, Inc., 250 B.R. 805, 813-14 (Bankr. N.D. Ga. 2000), the court stated:

> The factual differences aside, **Lewis is not binding authority in this circuit, and the Court declines to follow it**. The bottom line is that **Roadmaster incurred a legal obligation to DMAC long before the parties reached a settlement**. See Upstairs Gallery, 167 B.R. at 918 ("A later compromise of the claim does not affect the time when the debt first arose.") (citation omitted). Because **the Court is at a loss to explain how the settlement did or could destroy the antecedent quality of the underlying debt**, it must reject DMAC's contention that there can be no transfer on account of an antecedent debt if the transfer was made in settlement of litigation.

(Citations omitted and emphasis added).

Moreover, in In re Lease-A-Fleet, Inc., 151 B.R. 341, 352 (Bankr. E.D. Penn. 1993), the court distinguished Lewis and Nelson and found that both of those decisions appeared "driven by the respective courts' conclusion that what the parties exchanged in the respective settlements was substantially equivalent." The court also noted that "the debtors in Lewis and Nelson were not prepared to 'give back' the benefits which they received in exchange for the payments made to them." The court explained:

> We doubt that Lewis stands for the principle that, merely because a payment is made by a debtor in settlement of litigation, a payment on an antecedent debt is necessarily transformed into a contemporaneous exchange. There is no question that a debtor's payment on an antecedent

> debt where there has been no litigation with the creditor paid is within the scope of § 547(b)(2). There is also little doubt that a debtor's payment of antecedent debt in satisfaction of a creditor's judgment obtained through litigation would be within the scope of § 547(b)(2). It thus seems nonsensical to argue, as does MAC, that merely because the parties settled litigation, and this settlement resulted in payments to the creditor, the settlement creates a new obligation for which the payment may be deemed outside of the scope of § 547(b)(2) and as 'a contemporaneous exchange for new value.'"

Id.

In sum, the bankruptcy cases cited by CSX to support its view have been criticized by numerous court and should not be followed. Furthermore, CSX's cases are factually distinguishable, and they represent the minority view.

III. THE COURT MUST REJECT CSX'S ARGUMENTS THAT ANY NEW AND CONTEMPORANEOUS CONSIDERATION PROVIDED TO SAIC NEED NOT HAVE MEASURABLY ENHANCED SAIC'S ESTATE.

CSX also contends in its Opposition Brief that if it provided new and contemporaneous consideration to SAIC's estate it need not show that such consideration measurably enhanced the estate, or provide any evidence of the amount of that enhancement. See Opposition Brief at 21, 25-26. However, if such an argument is accepted, it would undermine the important public policy embodied in the preference provisions of Utah's insurance liquidation statute. That policy is to protect individual policyholders and other claimants by not permitting certain creditors to place themselves in a superior position to other similarly situated creditors. Lincoln Towers Insurance Agency, Inc., 684 N.E.2d 900, 904 (Ill. App. 1997) ("avoiding preference of creditors is an aim of liquidation just as it is in federal bankruptcy [citation omitted] and liquidation statutes are intended to protect individual policyholders and other claimants without permitting certain classes of creditors to place themselves in a superior position").

As stated above, the justification and purpose underlying the new and contemporaneous consideration defense "is that transferring collateral in exchange for an infusion of new capital does not harm existing creditors because it does not diminish the debtor's assets." If the Court accepts CSX's argument that new and contemporaneous consideration was provided by a release claims that could arise in the future, then CSX is only entitled to a defense as to that portion of the payments that went to those future claims.[6] Any other interpretation would obliterate the Liquidator's power to set aside preferential transfers. As explained in In re Jet Florida Systems, Inc., 861 F.2d 1555, 1559 (11th Cir. 1988), a case in which the creditor argued that it should not have to provide any evidence of the amount of new value provided:

> American's interpretation of section 547(c)(1) would eviscerate the trustee's power to set aside preferential transfers. A creditor could retain the full value it received in the exchange if it could show merely that the debtor and creditor intended for the 'new value' to be worth something, however hypothetical or ephemeral. Section 547(c)(1) would become nothing more than a fraud provision.

Moreover, there is nothing in the statutory language of Utah Code Annotated § 31A-27-321(4) which indicates that a creditor need not show the amount of new and contemporaneous consideration provided. However, when considering the purpose

---

[6] In this case, the October 14, 1991 Settlement Letter unequivocally states that the $308,000 paid to CSX was "in full satisfaction of any claim by CSX against the policies issued by Southern for any losses due to Asbestos-Related Claims, past, present, or future, whether or not asserted in the Coverage Suits." (R. 471). Thus, it is apparent that a substantial portion of the payments made by SAIC were for the release of past or present claims.

behind Utah's preference statute, a creditor should be required to show that any new and contemporaneous consideration measurably enhanced the liquidation estate. Because CSX failed to present any evidence as to the amount of new and contemporaneous consideration that it contends augmented the estate, the trial court erred in granting summary judgment in CSX's favor.

IV. CSX'S ARGUMENT THAT THE LIQUIDATOR'S PREFERENCE ACTION IS BARRED BY THE ORDINARY COURSE DEFENSE ALSO FAILS.

CSX argues alternatively in its Opposition Brief that if this Court should rule against it on the new and contemporaneous consideration exception, then it should nevertheless affirm the grant of summary judgment by the trial court based upon the ordinary course defense. See Opposition Brief at 27-34. As acknowledged by CSX, the trial court did not reach this issue. However, even if this Court chooses to address this question, the Court should still reverse the summary judgment entered in favor of CSX and remand for the entry of summary judgment in favor of the Liquidator on all issues except whether SAIC was insolvent at the time of the first two payments to CSX.[7]

As shown below, contrary to CSX's assertions, the three payments made by SAIC to CSX were not made within forty-five days after the debt was incurred, nor were they

[7] CSX wishes to have this Court reach these legal issues but does not wish to be bound by any determination made by this Court. Specifically, CSX argues that if this Court rules against CSX on these issues the matter should not be remanded for the entry of summary judgment in favor of the Liquidator but for further proceedings by the trial court. Such an approach is wasteful and unfair. If this Court decides the legal issues raised in this section of the brief, further proceedings (other than the entry of summary judgment) would be unwarranted.

incurred in the ordinary course of SAIC's insurance business or according to normal business terms.[8]

A. The Three Payments by SAIC to CSX Were Made More than Forty-Five Days After the Debt to CSX Was Incurred.

CSX contends that the three payments were not made for the original claims that were brought against SAIC by CSX because those claims were effectively "abandoned" as a result of the execution of the October 14, 1991 Settlement Letter. See Opposition Brief at 29. However, the terms of the October 14, 1991 Settlement Letter rebut CSX's argument. Section I of that letter provides as follows:

> **In settlement of the Coverage Suits**, the parties agree to the following payment provisions:
>
> 1. Southern will pay CSX the sum of $308,000.00 as follows:
>
> $102,667.00 on October 31, 1991
>
> $102,667.00 on November 31, 1991
>
> $102,666.00 on December 31, 1991
>
> **This sum shall be in full satisfaction of any claim by CSX against the policies issued by Southern for any losses due to Asbestos Related Claims, past, present, or future, whether or not asserted in the Coverage Suits.**

(Emphasis added). (R. 471). The foregoing language expressly states that the payments made by SAIC to CSX were intended to fully cover the original claims brought by CSX against SAIC, including those arising under the lawsuits that had been filed by CSX

[8] CSX also argues that the payment were not for antecedent debts. This argument fails for the reasons set forth in Section II and in the following section of this brief.

against SAIC, the last of which was filed in January of 1990, and those arising under the insurance policies issued by SAIC to CSX, the coverage periods of which ran from July 14, 1979 through July 31, 1982. Thus, as a matter of law, the payments were for debts that preceded the settlement agreement.

Second, CSX asserts that SAIC's liability to it could not have arisen prior to the execution of the October 14, 1991 Settlement Letter because the parties had not sufficiently agreed to the settlement terms. However, this argument is likewise unavailing. First, it is immaterial when the settlement agreement was reached. See Section II.A. hereof. As a matter of law, the debt arose during the coverage period of the insurance policies. Second, CSX's argument is specifically rebutted by the documents the parties executed. For example, on August 16, 1991, counsel for SAIC wrote a letter to counsel for CSX which read as follows:

> In my August 8, 1991 letter to you, I proposed a lump sum payment of $308,000 to settle this matter on behalf of Southern American Insurance Company. This proposal is based on a payment schedule which would provide for the first 1/3 payment due on October 31, 1991, are [sic] the remaining 1/3 payments due on November 31, 1991 [sic] and December 31, 1991. Please call me if you would like to discuss either the amount or the payment schedule which Southern has proposed.

(R. 468).

On August 26, 1991, counsel for CSX sent the following response to counsel for SAIC:

> CSXT has asked me to convey to you that it is **willing to accept** Southern American's offer of $308,000 to settle CSXT's asbestos coverage litigation. CSXT understands that Southern American will make the payment in three installations due on October 31, November 30, and December 31, 1991, respectively. (I would suggest the first two payments be in the amount of $102,667 each and the last in the amount of $102,666.)

> Please provide me, for CSXT's review, with Southern American's proposed settlement documents as soon as possible.

(R. 469).

CSX claims that the August 26, 1991 letter did not constitute an unconditional acceptance because it proposed different terms as to the amount and time of payment. The Liquidator fails to see any difference in the terms. On August 16th, SAIC offered to pay CSX $308,000 in one-third installments due at the end of October, November, and December. On August 26th, CSX stated it was willing to accept SAIC's offer to pay CSX $308,000 in three installments at the end of October, November, and December.

Any question that SAIC and CSX had reached an agreement prior to October 14, 1991 is settled by the terms of the October 14, 1991 Settlement Letter itself, which states in the first sentence, "**This will confirm the arrangements agreed to** in connection with the asbestos-related settlement between [SAIC] and [CSX]. **The arrangements that have been agreed to are: . . .**", and then the letter goes on to set forth the same payment provisions SAIC offered in its August 8, 1991 letter, and CSX accepted in August 26, 1991 letter. (Emphasis added).

Third, CSX argues that because the October 14, 1991 Settlement Letter created a three month payment schedule, SAIC's debt to CSX did not accrue until each payment had to be made by SAIC under that schedule, i.e. on October 31, 1991, November 30, 1991, and December 31, 1991. However, in making this argument, CSX fails to take into account that a later compromise of a claim does not affect the time when the debt first arises. See In re Upstairs Gallery, Inc., 167 B.R. 915, 918 (9^{th} Cir. BAP 1993). In this case, SAIC's liability to CSX did not arise as a result of the October 14, 1991 Settlement Agreement. SAIC's liability to CSX arose because of the issuance, many years earlier, of multiple third party insurance policies in favor of CSX. Moreover, CSX filed multiple lawsuits against SAIC (also many years earlier) to recover on those insurance policies. The October 14, 1991 Settlement Letter merely sets forth the compromise of the parties on payment of these pre-existing claims.

B. CSX Failed to Offer Any Evidence To Support Its Argument That the Debt to CSX Was Incurred In the Ordinary Course of Business of SAIC and According to Normal Business Terms Within the Insurance Industry.

CSX also maintains that the payments made by SAIC were incurred in the ordinary course of SAIC's business. The sole basis for CSX's argument is that SAIC was in the insurance business, and therefore, the arrangements between CSX and SAIC must have been ordinary. See Opposition Brief at 31-32. However, the burden of proof was on CSX to show that the arrangement was an ordinary one for SAIC and CSX did not meet this burden because it did not support its argument with any affidavits, testimony, or other evidence.

To show that the payments were within the ordinary course of business of SAIC requires an analysis of SAIC's specific business operations and a determination as to whether the type of arrangement entered into between CSX and SAIC was an unusual one for SAIC. See Fidelity Sav. & Inv. Co. v. New Hope Baptist, 880 F.2d 1172, 1177 (10^{th} Cir. 1989) (the court looked to what the debtor did as a regular part of its daily business to determine whether a particular transaction was in the ordinary course of that debtor's business). CSX presented absolutely no evidence to the trial court regarding

SAIC's specific business practices. CSX's unsupported conclusion that the arrangement was an ordinary one for SAIC is insufficient as a matter of law.

CSX also argues, again without any evidentiary support, that the arrangement between it and SAIC must have been made according to normal business terms, because SAIC was in the insurance business. Under CSX's argument, any settlement arrangement involving the acknowledgement of a debt and containing a payment schedule would be normal within the insurance industry, no matter how out of the ordinary its terms may be. However, at the very least, the determination of whether a particular arrangement is normal within an industry requires an analysis of the industry itself, and CSX failed to offer any evidence as to normal business practices within the insurance industry.

In any event, CSX cannot overcome the well-established legal principle that debts which are paid pursuant to settlement agreements are inherently not normal. See In re Meredith Hoffman Partners, 12 F.3d 1549, 1553 (10^{th} Cir. 1993) cert. denied, 512 U.S. 1206 (1994). Even though insurance companies may review and settle claims as part of their every day business, the filing of a lawsuit implies that the insurance claim process has broken down. That is the reason a lawsuit is filed. The parties have a disagreement, and to resolve that disagreement they bring it before an impartial tribunal. Cases such as Meredith Hoffman illustrate that when a lawsuit is filed, it can be presumed as a matter of law that the parties are no longer dealing within the ordinary course of their business or according to normal business terms within the industry.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the trial court on the new and contemporaneous consideration defense and direct the trial court to grant summary judgment in favor of the Liquidator on this issue. If this Court reaches the issue of whether the ordinary course defense is applicable in this case, it should rule as a matter of law that CSX has failed to establish this defense and remand for the entry of summary judgment in favor of the Liquidator on this issue.

DATED this 4th of February, 2002.

RAY, QUINNEY & NEBEKER

Brent D. Wride
Elaine A. Monson

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the REPLY BRIEF OF APPELLANT were mailed, postage prepaid, on this 4th day of February, 2002, to the following:

E. Scott Savage
Samuel O. Gaufin
Eric K. Schnibbe
BERMAN, GAUFIN, TOMSIC, SAVAGE & CAMPBELL
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144

629047.03/eam